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The Balance Between Recording Artists and Recording Companies: A Tip in Favor of the Artists?

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"Record companies can fire us, but we can't fire them."[1]

The Balance Between Recording Artists and Recording Companies: A Tip in Favor of the Artists?

By Nicholas Baumgartner[2]

I. Introduction

In a recent article, entertainment and copyright attorney Lynn Morrow noted that "there always has been a voice of protest against the record labels' treatment of their artists, with the major labels bearing the brunt of the complaints."[3] Morrow further states that "the theme of the protests is that record deals are designed to take advantage of the artist, and record companies are filled with people who lack compassion, do not care about artists or music, and are concerned only about taking home a big paycheck while the artist starves."[4] While many music-listeners throughout the world may instinctively agree with this view, some artists, however, have a favorable view of the recording industry. Regarding the global success of the Early Music movement,[5] for example, Dutch conductor and keyboardist Ton Koopman[6] recently asserted:

> I am convinced that the Early Music movement owes its entire existence to the record industry. In the beginning, many of the record companies could not afford big artists or ensembles like the Concertgebouw Orchestra, so they took the chance of entering the market with something that no one else had—recordings on old instruments. The idea gained a following, and now it is a huge industry. But without the record companies, none of us performers would be in the positions we are in now.[7]

Fortunately, however, Koopman joined the Early Music movement during the 1960s—the movement's adolescent stages. This means that by the time large, consolidated record companies such as Time-Warner were knocking on his door in the 1980s and 1990s, Koopman was already in a position with significant bargaining power. Indeed, while Koopman has hitherto made over 150 recordings on numerous large and small labels, the current production of his 80-disc *chef d'oeuvre*, the complete Cantatas of J.S. Bach, is under the auspices of Time-Warner/Erato.[8]

Contemporary emerging, lesser-known artists, however, generally do not possess such bargaining power. Morrow observes that "record companies know that the bargaining position of an artist is weakest at the beginning of that artist's career. If the artist begins to sell platinum albums, the bargaining power shifts to the artist."[9] In negotiating the length of the recording contract's term, tension may mount between the record company's insistence on a long enough period to justify its frequently substantial investment of time and money, and the artist's insistence on a short enough period to justify the possibility of giving away some of his or her best creative years in exchange for a modest financial return.[10] Two statutes—one federal and one state—govern a substantial number of recording contracts in the United states: the "work made for hire" provisions pursuant to 17 U.S.C. § 101 (hereinafter "Copyright Act"),[11] and the "Seven Year Statute" under California Labor Code § 2855 (hereinafter "Seven Year Statute").[12] Within the past several years, developments surrounding these statutes have affected recording contracts, and in particular recording artists, both positively and negatively.[13] Since late 2000, the balance between recording companies and recording artists may, however, be tipping—as a result of intransigent lobbying for favorable amendments to the Copyright Act and to the Seven Year Statute—in favor of the artists.

First enacted in 1976, the Copyright Act was intended to provide insurance for individuals producing various types of works for larger entities—such as film companies—that at a particular future point, the creator of those works could reclaim his interest in the works.[14] Aware that such vesting of interest would not be possible in all situations—e.g., film soundtracks, instructional texts, and standardized tests—Congress accordingly provided that certain works such as these constituted "works made for hire" produced by an individual not as an employee, but rather as an independent contractor.[15] Originally, Congress did not include "sound recordings" in its list of "works made for hire." That is, it appears Congress intended that creators of sound recordings—if the recordings were not created in the context of an employment agreement—should *not* be considered independent contractors for purposes of the copyright laws. The fact that sound recordings were not originally included in the enumerated examples of works made for hire further suggests that creators of sound recordings were thought by Congress to possess a future interest in their recordings. Yet in November 1999,

Congress amended the definition of "works made for hire" to include sound recordings.[16] This move came to the great surprise of recording artists and their lobbying organizations—such as the Recording Artists' Coalition (hereinafter "RAC")[17] and the American Federation of Television and Radio Artists (hereinafter "AFTRA")[18] —and quickly aroused their fury.[19] For recording artists, the inclusion of sound recordings in the definition of "works made for hire" meant that they lost their rights of termination—that is, they possessed *no* interest in the works that would vest after a certain number of years.[20] Following persistent lobbying by these associations, as well as by a group of twenty-seven law professors,[21] Congress again amended the definition of "works made for hire" in October 2000 to *remove* sound recordings.[22] While this removal constituted a clear victory for recording artists, another significant hurdle currently faces artists in California.

The second statute governing a substantial number of recording contracts is California's Seven Year Statute.[23] The Seven Year Statute was first enacted in 1937 as a modification of California's rule limiting the period during which a personal service contract may be enforced by specific performance.[24] As currently enacted, the Seven Year Statute limits enforcement of personal service contracts, including contracts of "unique, ... extraordinary, or intellectual character," to seven years from the commencement of service under the contract.[25] The statute was amended in 1987 to include an exception applicable to recording artists alone.[26] This exception "subjects recording artists, unlike any other employee rendering creative, intellectual or professional services under contract, to lawsuits for damages alleged to flow from the artists' failure to deliver services (i.e., sound recordings) during the term of the contract and without regard to California's normal limitations period for breach-of-contract claims."[27] The practical effect of this exception on recording artists is that the obligations of a typical recording contract—which include not only production of seven to nine albums, but also such promotional obligations as advertisements, promotions, and concert tours—will be impossible to fulfill within seven years. Indeed, fulfillment of some contracts can be drawn out to more than fourteen years—double the statutory limit for other personal service contracts.[28] Throughout the past two years, California State Senator Kevin Murray, bolstered by RAC and AFTRA, has led a campaign to eliminate this exception by amending the Seven Year Statute as set forth in California Senate Bill 1246 (hereinafter "SB 1246").[29] The ideal result of this campaign would be that an artist, in negotiating a recording contract for the first time, would not face the prospect of being bound by the contract for longer than seven years—no matter what the terms of the contract may provide. Recent pressure by the recording companies, however, has led Senator Murray to modify his proposed amendment.[30] Instead of eliminating the exception for recording artists entirely, Senator Murray proposes to limit damages that a recording company may claim from a recording artist if the artist breaches his or her contract more than seven years after signing.[31] While such an amendment is less desirable to recording artists than complete elimination of the 1987 exception, the current proposal may be a necessary concession to the recording companies in order to achieve the passage of SB 1246 at all.

II. Governing Statutes

17 U.S.C. § 101 "Copyright Act"

Lynn Morrow states that once an artist signs a recording agreement, "the artist's activities in every arena of the record industry are exclusive to the record company during the length of the term."[32] In recent years, both Congress and the courts have attempted to define what exactly should be the length of this "term." In order to define the term, Congress has first had to determine the scope of the "works made for hire" provision of 17 U.S.C. § 101.[33] The statutory definition of a "work made for hire" contains two parts.[34] First, a work made for hire is "a work prepared by an employee within the scope of his or her employment."[35] Second, a work made for hire may be created by an *independent contractor* for any of nine uses specified by the statute: "as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."[36] Professor Geoffrey Hull notes two ramifications of a "work made for hire":

> First, the employer, not the person who created the work, is deemed to be the author for purposes of copyright. That means no further transfer of rights is necessary. It happens automatically. More importantly, the person who created the work does not have any termination rights in the work. Thus, in works made for hire, the creator of the work does not have a right to "recapture" the copyrights after a period of time (thirty-five to forty years). The employers can then be totally sure that they will own the copyrights for their entire duration (seventy-five years from first publication or one hundred from creation, which ever ends earlier).[37]

The dispute between recording artists and recording companies, then, is whether a sound recording falls within the definition of a "work made for hire" as set forth in 17 U.S.C. § 101. Recording artists have a personal interest in ultimately recapturing their copyrights, and thus argue that a sound recording should *not* be considered a "work made for hire." Recording companies, on the other hand, seek to

retain for as long as possible their interest in the recording. Since considering a sound recording a work made for hire enables them to do so, recording companies contend that a sound recording *should* be considered a "work made for hire."[38]

In order to better contextualize the debate surrounding the "work made for hire" provisions, one should briefly examine the relevant provisions of a typical recording contract:

> **COMPANY'S ADDITIONAL RIGHTS**
> 9.01. You warrant, represent and agree that throughout the Territory Company is the sole, exclusive and perpetual owner of all Masters Delivered hereunder or otherwise recorded by Artist during the term of this agreement, all Videos embodying those Masters or otherwise produced hereunder, and all artwork created for use in connection with the Masters and/or Website Material and/or ECD Material (individually and collectively referred to herein as ("Artwork"), which ownership entitles Company, among other things, to all rights, title and interest in the copyrights in and to the Masters, Videos (but excluding the copyrights in the Compositions contained therein) and Artwork. Each Master, Video and Artwork made under this agreement or during its term, from the inception of its recording, will be considered a "work made for hire" for Company; if any such Master, Video and Artwork is determined not to be such a "work," it will be deemed transferred to Company by this agreement, together with all rights and title in and to it. You warrant, represent and agree that all Masters and Videos made under this agreement or during its term (including duplicates, work tapes, etc.), the performances contained thereon and the related Artwork, from the inception of their creation, are the sole property of Company, in perpetuity, free from any claims by you, Artist or any other Person, and Company has the right to use and control same subject to the terms herein.[39]
>
> **COMPANY'S ADDITIONAL REMEDIES**
> 13.03. You acknowledge, recognize and agree that Artist's services hereunder are of a special, unique unusual, extraordinary and intellectual character, giving them a peculiar value, the loss of which cannot be reasonably or adequately compensated for by damages in an action at law.[40] Inasmuch as a breach of such services will cause Company irreparable damages, Company will be entitled to injunctive and other equitable relief, in addition to whatever legal remedies are available, to prevent or cure any such breach or threatened breach. Nothing in this agreement will prevent you from opposing such injunctive relief on any grounds that do not negate your acknowledgments in this paragraph.[41]
> 13.05. (a) You agree to and do hereby indemnify, save and hold Company and its licensees harmless from any and all liability, loss, damage, cost and expense (including legal expenses and attorney fees) arising out of or connected with any breach or alleged breach of this agreement or any claim that is inconsistent with any of the warranties or representations made by you in this agreement. You agree to reimburse Company on demand for any payment made or incurred by Company with respect to the foregoing sentence, and, without limiting Company's rights or remedies, Company may deduct any amount not so reimbursed by you from any monies Company or an affiliate of Company owes you, whether hereunder or otherwise.[42]

Section 9.01 of this contract expressly provides that any work that the artist creates under this contract is a "work made for hire" for the company. In other words, it appears that this contract entitles the company to an airtight claim to any creation of the artist during the duration of the contract. Basic contract law suggests that a recording artist should be bound by signing a contract so long as the provisions of the contract are not unconscionable. Yet the actual power of these particular provisions-that a recording artist's works are unconditionally to be considered "works made for hire"-depends largely on current Congressional and judicial interpretation.[43] Within the past several years, such interpretation has reflected vociferous lobbying by the recording companies and their primary lobbying group, the Recording Industry Association of America (hereinafter "RIAA"),[44] as well as by recording artists, celebrities, RAC,

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AFTRA and even law professors.[45]

The first move in the dispute whether sound recordings fall within the definition of "works made for hire" occurred as a result of lobbying by recording companies and associations such as RIAA. On November 29, 1999, the United States Congress passed the 1000-page Consolidated Appropriations Act 2000.[46] Buried within one of its titles, the Satellite Home Viewer Improvement Act, an amendment labeled "Technical Amendments" changed the Copyright Law, 17 U.S.C. 101, "to the detriment of recording artists."[47] That is, Congress added "sound recordings" to the nine already existing definitions of "works made for hire."[48] Responding to this move by Congress, AFTRA, in its Position on "Work Made for Hire" and Section 101 of the Copyright Act, declared that:

> without consultation with performers or their representatives, without prior notice, without legislative committee hearings, and without debate in either the House of Representatives or the Senate, the amendment added "sound recordings" to the list of works which could be a "work made for hire" under that definition in the Copyright Act. Significant rights of thousands of performing artists were wiped out by the inclusion of those two words, "sound recordings," under the label of a "clarifying change."[49]

THROUGHOUT the past two years, California State Senator Kevin Murray, bolstered by RAC and AFTRA, has led a campaign to eliminate this exception by amending the Seven Year Statute as set forth in California Senate Bill 1246.

The practical effect of inserting sound recordings into the Copyright Act was to strip recording artists of the "right of termination," which would have begun to vest in the year 2013, thirty-seven years after the enactment of the Copyright Act in 1976.[50] This means that recording artists' interests in the works they created under contract will not vest until the entire duration of the copyright has run out (seventy-five years from first publication or one hundred from creation, whichever ends earlier).[51] In other words, since most artists will be dead by the time the copyright expires, they effectively have no interest whatsoever in their own works.

Recording companies, however, do have reason to maintain the highest possible bargaining position.[52] By entering into a contract with an artist as yet unknown, the recording company takes a substantial risk. That is, without any guarantee whatsoever that it may see a return on its investment, a major record company may spend between $500,000 and $1,000,000 to launch a new artist.[53] The recording company pays the initial production costs, including studio, instrument, and equipment rental, travel expenses, producer salaries, and advances to the artist.[54] If an artist "flops," then the recording company may release him from the contract, but the money is not recoupable.[55] If, on the other hand, the artist is successful (measured in record sales), the artist will receive royalty payments ranging from eleven percent for an emerging artist to twenty-one percent for a "superstar" artist.[56] Pursuant to the contract, the artist is required to use royalties to repay the recording company the initial expenses that were advanced to the artist.[57] Because an artist's bargaining power increases with each successful launch of a new record, the recording company's interest in retaining its own bargaining power increases concomitantly.[58] Ultimately, the most valuable bargaining chip between the company and the artist becomes the rights to the work produced and both sides will fight to secure this right as early as possible.

As the sample recording contract above implies, most contracts provide that all works created by the artist pursuant to the contract will be considered to be made for hire.[59] Before the 1999 amendment of the Copyright Act, the extent to which such provisions were enforceable was unclear.[60] By adding sound recordings to the definition of "works made for hire," Congress in the 1999 amendment appeared to make clear its sanctioning of such provisions in recording contracts. As already stated, this was a victory for recording companies and a setback for recording artists. The Congressional policy underlying the original 1976 Copyright Act was to promote and ensure "the attribution of authorship to the individual or individuals actually responsible for the creation of works."[61] Thus, the status of a work as being made for hire had, until November 1999, been more the exception than the rule.[62] When a contract, such as the sample contract above, designated an artist's contribution as work made for hire and the statute did not expressly recognize the designation-as before November 1999-the contract "may operate as an ordinary assignment transferring the artist's share of the sound recording copyright."[63]

Prior to the 1999 amendment, the contract would not, however, prevent the artists or their successors from

electing to recapture the rights thus assigned under the Act's "termination of transfer" provisions.[64] That is, before the 1999 amendment, Congress had provided a failsafe of sorts for artists who leased the rights to their works to publishers, producers, recording companies, etc. --provided that works were not of the type the statute designated as made for hire. Again, the statute still did not include "sound recordings" in its enumeration of works made for hire. Section 203 of the Copyright Act allows the creators of such works to "recapture" their copyrights after a period of time "during which the initial transferee, usually a publisher or label, has had ample time to exploit the work."[65] Generally, the termination "window" begins thirty-five years after the transfer and runs for five additional years.[66] During this window, termination may be effected by written notice to the transferee (owner) signed by a majority of the owners of the termination interest (e.g., the author, the author's spouse, or the author's children).[67] Congress underscored the power of this failsafe by additionally providing that, so long as the conditions of the statute are met, termination "may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant."[68] Thus, when Congress added sound recordings to the definition of works made for hire, it extinguished all termination rights that recording artists reasonably could hope would vest within their lifetimes.

This amendment notwithstanding, it is still clear that certain types of sound recordings constitute "works made for hire" within the scope of the Copyright Act. As noted earlier, the Copyright Act does indicate that a work "prepared by an employee within the scope of his or her employment" will in all cases be considered a work made for hire. [69] Those sound recordings not prepared within an employment context, but that are considered works made for hire, include recordings in which the company exercises a high degree of control over the artist's creative activities, such as the musical score for a motion picture, or other situations in which the work of the artist is merely a component of a larger, generally non-musical work.[70] Numerous scholars have suggested the use of the multi-factored test in *Community for Creative Non-Violence (CCNV) v. Reid*[71] in order to address disputes concerning the status of works created in situations where a record company exercises a high degree of control over an artist's activities.[72] Derived from the common law of agency, this test determines whether the artist, within the scope of his or her contract with the recording company, was an employee, or instead an independent contractor. [73] The benefit to the recording artist of being considered an independent contractor, rather than an employee of the recording company, is that works created by an independent contractor may be considered made for hire only under the very specific circumstances defined in section 101 of the Copyright Act.[74] Indeed, despite the paucity of direct authority on how the *CCNV* test should or might be applied to recording artists, the same scholars assert that "general case law suggests that courts will be grudging in applying it to deprive artists of authorship rights. Certainly, we would not expect them to do so as a uniform matter. Thus, at least a significant number of recording artists are likely to be considered 'independent contractors' in their relations with recording companies."[75]

The cautious optimism embodied in this prediction however, was defeated in November 1999 when Congress added sound recordings to the definition of "works made for hire."[76] Ryan Rafoth observed that "until November 29, 1999, artists' attorneys had rested on the assumption that the issue whether sound recordings are works-for-hire would be decided by courts around year 2013."[77] When Congress discreetly amended the definition of "works made for hire" in the Copyright Act, it effectively resolved this issue in favor of the recording companies fourteen years in advance.[78] Rafoth also suggests that had Congress not amended the works made for hire definition, around year 2013 courts would have found that artists' sound recordings were not works-for-hire in accordance with equitable principles,[79] legal precedent,[80] and congressional policy underlying the 1976 Copyright Act.[81] A United States District Court recently reached this conclusion. On March 5, 1999, the court in *Ballas v. Tedesco*[82] held that "sound recordings are not a work-for-hire under the second part of the statute because they do not fit within any of the nine enumerated categories."[83] Unfortunately, Congress passed the 1999 amendment without considering equitable principles or legal precedent. The twenty-seven scholars writing on behalf of recording artists contended, moreover, that "it would strain ordinary principles of statutory construction (to say nothing of common sense) to extend this rubric to the individual musical selections making up an album of songs created as an artistic unit by a single recording artist."[84] The legislative action that occurred in November 1999, then, nullified the assumption enjoyed by recording artists that their respective interests in the recordings they had made would vest at a reasonable point within their lifetimes.

California Labor Code § 2855 "Seven Year Statute"

The decades-old controversy surrounding California Labor Code § 2855, commonly known as the Seven Year Statute, is at the heart of the current tension between recording artists and recording companies. [85] The legislation that ultimately became the Seven Year Statute was originally enacted in 1870 in order to protect employers from being obligated to their employees who came West at their suggestion. [86] Originally, the statute was designed to limit the duration of personal service contracts to two years. In 1937, however, the statute was amended to limit

such contracts to seven years, hence becoming the Seven Year Statute.[87] Today, the statute consists of two parts: the rule and an exception.[88] The rule, § 2855(a), limits the length of personal service contracts to seven years:

> Except as otherwise provided in subdivision (b), a contract to render personal service...may not be enforced against the employee beyond seven years from the commencement of service under it. Any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which can not be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render the service, for a term not to exceed seven years from the commencement of service under it. If the employee voluntarily continues to serve under beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.[89]

Added in 1987, the exception exempts recording artists from the seven-year limitation, thus allowing for enforcement of recording contracts—but no other personal service contracts—in excess of seven years.[90]

Articulating the original policy underlying the Seven Year Statute, the seminal case *De Haviland v. Warner Bros. Pictures*[91] held that enforcement of personal service contracts—including contracts of "special, unique, unusual, extraordinary, or intellectual character"—should be strictly limited to seven years from the commencement of services.[92] The contract between film actress Olivia de Haviland and Warner Brothers provided for a term of one year and six successive one-year options for Warner Brothers to renew.[93] In addition, the contract provided that Warner Brothers "had the right to extend the term of the contract at its option, for a time equal to the periods of suspension."[94] It turns out that while Warner Brothers exercised all of its options, it also suspended De Haviland for a total of twenty-five weeks.[95] After the seventh year of the contract, De Haviland sought and obtained in the Superior Court for Los Angeles County a declaration under the Seven Year Statute that Warner Brothers could no longer enforce the contract against her.[96] Rejecting Warner Brothers' challenge to the declaration, the California Court of Appeals held that the suspension provision in the contract between De Haviland and Warner Brothers was unenforceable *even if* De Haviland originally agreed to it.[97]

This holding was couched in a policy argument that set the stage for the 1987 amendment creating the exception for recording artists:

> If an employee may waive the statutory right in question by his conduct, he may waive it by agreement, but if the power to waive it exists at all, the statute accomplishes nothing. An agreement to work for more than seven years would be an effective waiver of the right to quit at the end of seven. The right given by the statute can run in favor of those only who have contracted to work for more than seven years and as these would have waived the right by contracting it away, the statute could not operate at all. It could scarcely have been the intention of the Legislature to protect employees from the consequences of their improvident contracts and still leave them free to throw away the benefits conferred upon them. The limitation of the life of personal service contracts and the employee's rights thereunder could not be waived.[98]

In 1987, however, the RIAA lobbied California legislators to extend the Seven Year Statute to ten years.[99] After this effort failed, the RIAA instead lobbied legislators to grant "music labels a special exemption to the law" and "to give them the right to sue artists for damages resulting from undelivered albums."[100] This successful push, then, led to the single exception to the Seven Year Statute:[101]

> § 2855 (b) Notwithstanding subdivision (a):
>
> (1) Any employee who is a party to a contract to render personal service in the production of phonorecords...may not invoke the provisions of subdivision (a) without first giving written notice to the employer...specifying that the employee from and after a future date certain specified in the notice will no longer render service under the contract by reason of subdivision (a).
>
> (2) Any party to such a contract shall have the right to recover damages for a breach of the contract occurring during its term in an action commenced during or after its term, but within the applicable period prescribed by law.
>
> (3) In the event a party to such a contract is, or could contractually be required to render personal service in the production of a specified quantity of the phonorecords and fails to render all of the required service prior to the date specified in the notice provided in paragraph (1), the party damaged by the failure shall have the right to recover damages for each phonorecord as to which that party has failed to render service in an action which, notwithstanding paragraph (2), shall be commenced within 45 days after the date specified in the notice.[102]

In lobbying for this amendment, the RIAA contended that "the bill is needed to counter the tactics of successful artists who are in a position to bargain one recording company against another."[103] Proponents of the amendment also argued that it was necessary to ensure that recording artists comply with contracts to complete a specified number of recordings within the terms of a contract.[104] According to Morrow, recording contracts "typically have an initial

period with multiple, successive options that a record company can exercise, in its sole discretion, to require the artist to record additional albums. During the initial term and each option period, the artist generally must provide a guaranteed number of albums, with each album commonly containing a minimum of ten individual master recordings."[105] In addition, record companies typically provide artists with advance payments on their earnings to cover costs arising during the recording process.[106] Because of these advances, record companies report "it usually takes a number of years and considerable expense before they realize the profit from a recording artist, frequently not until the end of the seven-year, enforcement-limitation period."[107]

Those opposing the amendment argued that recording companies usually require artists to agree to an unreasonable number of records as a condition for signing a contract—that is, a number that cannot reasonably be achieved within seven years.[108] In addition, recording artists including LeAnn Rimes, Courtney Love and the Dixie Chicks have recently contended that, because of promotion requirements such as tours and videos, fulfillment of their contract requirements can extend far longer than the time a typical seven-album contract facially would take.[109] Artists also contend that the RIAA, in its lobbying, failed to disclose this fact to the legislature.[110] According to testimony by artists' attorneys during the California Select Committee on the Entertainment Industry (September 5, 2001), a typical recording contract could take up to fourteen years to complete under current circumstances.[111] At this same hearing, country music singer LeAnne Rimes, then 19, testified that her contract, which she signed at age 12, will keep her bound to her label until she is 35.[112] Moreover, some recording contracts provide that the artist remains committed to the contract while at the same time the recording company delays releasing the product delivered by the artist.[113] Therefore, while recording companies are able to control the timing of an artist's delivery of a product, the companies also can and do insist upon terms that an artist cannot reasonably meet within seven years.[114] This, recording artists argue, means that not only can a recording company keep an artist bound for longer than seven years, but it also can "simultaneously withhold the artist's creations from the open market and thereby stagnate or destroy an artist's potential future marketability."[115] At the drafting of the amendment in 1987, however, there was no way for legislators to know such inner workings of recording contracts because the legislators neglected to call any artists to testify before passing the amendment.[116] Certainly cognizant also of the recording industry's lobbying power, Courtney Love, when she "does the math," cynically compares the lobbying behind the 1987 amendment of the Seven Year Statute to the sub-rosa lobbying behind the 1999 amendment of the Copyright Act:

> Universal Records sues me because I leave because my employment is up, but they say a recording contract is not a personal contract; because the recording industry—who, we have established, are excellent lobbyists, getting, as they did, a clerk[117] to disallow Don Henley or Tom Petty the right to give their copyrights to their families—in California, in 1987, lobbied to pass an amendment that nullified recording contracts as personal contracts.[118]

Recording companies still argue however, that while the recording industry grossed more than $41 billion in 2000, a substantial part of that sum was spent on artists and acts that never showed profit.[119] Miles Copeland, founder of I.R.S. Records, articulated at Kevin Murray's September 5, 2001 hearing that it is the risk of investing in an unknown artist and the concomitant front-end costs that distinguishes recording companies from other businesses. Because of these factors, Copeland contends, recording companies require the exception in the Seven Year Statute:

> The difference of our business, unlike banking and all that, is we invest millions of dollars in artists and at the end of it if it doesn't work, they walk, we're stuck holding the bag. This is why labels have to have a length of time with their artists, so they will spend these millions and millions of dollars to make artists happen. And if major artists simply walk out from their contracts, the record business will be in serious trouble and many, many artists who would like to have a career like Don Henley has had will never be given that opportunity.[120]

AFTRA, on the other hand, has observed that the current Seven Year Statute enables recording companies to sue artists for damages for breach of recording contracts if the artist fails to produce the required number of albums.[121] That is, the exception in § 2855(b) provides that after the statutory seven years have expired, a recording artist—unlike other individuals party to personal service contracts—are still bound by their contracts' terms. The threat of damage claims for breach of contract past the

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seven-year limit has a "chilling effect" on artists' freedom of contract and binds them to personal service contracts for periods of time far in excess of the seven-year limit established by the statute.[122] This "chilling effect" perhaps refers to the fact that under the Seven Year Statute a recording company is at liberty to sue a recalcitrant artist not only for damages, but also for specific performance.[123] That is, by seeking excessive damages in a suit against an artist,[124] a recording company has the power essentially to force an artist to record music if the defendant artist is unable to negotiate a satisfactory settlement—much less pay the alleged damages, which may be hundreds of millions of dollars.[125] Lawsuits ending in "satisfactory" settlements—such as *Courtney Love v. Vivendi Universal* and *Dixie Chicks v. Sony Music Entertainment*—suggest, however, that such settlements may only be achieved by prominent recording artists. Yet by limiting the length of all personal service contracts—including recording contracts, the pre-1987 Seven Year Statute seemed designed to protect less prominent artists, since it is they—as opposed to celebrity artists—who do not possess sufficient negotiating power if they seek to terminate their contracts prior to the expiration of seven years.[126] In this vein, AFTRA asserts that "given the strong and well-established public policy to provide individuals who provide personal services the freedom to be released from contracts after seven years, only an overwhelming and overriding interest should warrant that an exception be applied to one type of individual in one particular industry."[127] AFTRA vehemently contends that there is no such "overriding interest" presented here: "Indeed, AFTRA believes that the exception created by Section 2855(b) was unwarranted in 1987 and is even less justifiable today."[128]

III. Progress in Congress and in the Courts

2000 Amendment of the Copyright Act

As suddenly as it amended the definition of "works made for hire" in the Copyright Act in November 1999 to *include* sound recordings, the United States Congress amended the same provision again, less than one year later, to *remove* sound recordings from the definition of "works made for hire."[129] Unlike the relatively unceremonious passage of the 1999 amendment, the passage of the October 27, 2000 amendment occurred due to and amid uproar from the recording artist community. Formed specifically for this purpose, the RAC spearheaded the effort to lobby Congress to repeal the 1999 amendment, while the RIAA represented the interests of the recording companies.[130] A concern voiced frequently by recording artists and RAC is the lack of dialogue between the two associations. Before the repeal of the 1999 amendment, RAC, in a public statement, noted that:

> RAC believes strongly that Congress should reexamine the work for hire provisions in the 1976 Copyright Act with an eye toward clarifying authorship issues of sound recordings. However, before any real progress can be made on the work for hire issue, the record labels, represented by the RIAA, must fundamentally change their relationship with recording artists and more importantly, with the organizations and groups representing recording artists. While paying great lip service to the importance of the recording artist to their companies in testimony before Congress, the record labels and the RIAA have adopted a policy of indifference and confrontation regarding work for hire. The RIAA has made it very clear that they are not interested in meeting or negotiating with the recording artists. Nor have they shown a willingness to fulfill the strong desire of Congress for the parties to negotiate an acceptable work for hire amendment that would be supported by all factions in the music industry and Congress. Apparently, the RIAA has taken the position that they will fight this issue in court, thereby taking full advantage of the immense difference in financial resources between the record labels, owned and supported by multinational corporations, on the one hand, and the recording artists on the other. This record company posture is unacceptable to the recording artists, and should be unacceptable to Congress.[131]

Not only did the RAC voice its disagreement with Congress' 1999 amendment, but also a group of twenty-seven professors of intellectual property law from a broad range of law schools made their concern with the 1999 amendment heard as well.[132] These professors noted that the amendment "was no mere technical correction designed to clarify an otherwise settled point of statutory construction."[133] Rather, the practical consequences of the amendment, in the professors' view, was grave: "If left in place, the new language will deprive many musical artists of the right they otherwise would have enjoyed to benefit from a second chance in exploiting their recorded performances. This is because 'works made for hire' are, by the express terms of the statute, exempt from the operation of its 'termination of transfer' provisions."[134] The subsequent amendment in October 2000, then, restored the assumption enjoyed by recording artists that their respective interests in the recordings they had made would vest at a reasonable point within their lifetimes.

Two Lawsuits

While the greatest advances for recording artists have occurred in the U.S. and California Congresses, two recent lawsuits brought by artists against their recording companies capture the increasing frustration of artists toward the terms of their recording contracts, and in combination, focus national attention on California's Seven Year Statute.[135]

(1) *Courtney Love v. Vivendi Universal*

Provocative rock star Courtney Love sought to terminate her contract with Vivendi Universal Music Group and Geffen Records in December 1999.[136] In January 2000 however, Vivendi Universal brought an action against Love for breach of contract, seeking damages pursuant to the Seven Year Statute for five undelivered albums under her contract, which Vivendi Universal described as a "fair, industry-standard agreement" that she "willingly" signed.[137] In February 2001, Love filed a cross-complaint contending that the recording industry's long-term contracts violate the Seven Year Statute and that "she and other artists were forced to sign unconscionable recording contracts that hide profits and cheat artists out of royalty payments."[138]

In early October 2001, the *Los Angeles Times* noted that "in a procedural victory for rock star Courtney Love, a Los Angeles judge...allowed the majority of the claims in her contract termination suit against Vivendi Universal to move forward to trial."[139] Initially, Los Angeles Superior Court Judge Fumiko Wasserman denied eleven of the fifteen causes of action listed in Love's complaint.[140] Among the fifteen causes of action, Love challenged the Seven Year Statute.[141] Love's attorney stated that "the music industry scoffed at Courtney Love when she first filed her cross complaint, blasting it as ludicrous and frivolous. It seems that the judge disagrees with them... This is a case that will affect the record business for many years to come."[142] Love herself stated: "I want my seven-year contract law California labor code case to mean something to other artists... That's why I'm willing to do it with a sword in my teeth. I expect I'll be ignored or ostracized following this lawsuit."[143] Initially, Love's case moved forward to her benefit, in January 2002, the California Court of Appeals denied Vivendi Universal's petition for a writ of mandate "for failure to demonstrate entitlement to extraordinary relief."[144] Following this denial, the Court of Appeals set the trial date for June 11, 2002, in Los Angeles Superior Court.[145]

Instead of allowing the trial to proceed however, Judge Wasserman ordered Love and Vivendi Universal into mediation.[146] Finally, in September 2002 the two parties agreed to a settlement that released her from the recording contract with Vivendi Universal.[147] As part of the settlement, Love also gained ownership of numerous unreleased recordings by her band, Hole.[148] Vivendi Universal also credited Love with several hundred thousand dollars in royalties, but the company will receive, over a limited number of years, a percentage of the earnings from two of Love's future recordings at another record company.[149]

The greatest benefit of this settlement to Vivendi Universal may well be that it avoided having to argue in court the validity of the Seven Year Statute; as a result, it can leave this debate to the recording artists' and recording companies' interest groups, whose forum is the California State Senate. For Love, the greatest benefit is her release from the contract with Vivendi Universal without having to pay damages. The extent to which the settlement generally constitutes a gain for artists as against recording companies is, however, debatable. On the one hand, Love's case helped to "spur dozens of artists to activism and forced the industry to defend its practices in front of lawmakers."[150] On the other hand, some artists view the settlement as yet another example of an artist caving to the superior resources of a recording company.[151] Whichever may be the case, it is clear that this lawsuit, along with that of the Dixie Chicks against Sony Music Entertainment,[152] helped immensely in focusing media and public attention on the balance of power between recording artists and recording companies. As the issue of the Seven Year Statute's validity was never addressed, the settling of this suit greatly increases the significance of the vote set to occur in the California Senate.[153]

(1) *Dixie Chicks v. Sony Music Entertainment*

At the same time as the Courtney Love – Vivendi Universal lawsuit, the country music trio, the Dixie Chicks, were embroiled in a similar lawsuit with Japan-based Sony Music Entertainment arising out of their attempt to terminate their contract with Sony.[154] In July 2001, Sony brought action against the Dixie Chicks for breach of contract, demanding that Emily Robinson, Martie Seidel and Natalie Maines honor their recording contract by delivering five albums in addition to the two they have already recorded with Sony.[155] Sony alleged that the Grammy-winning group was trying to "slip out of their record deal on 'sham' claims that they have been underpaid."[156] The Dixie Chicks' first two albums for Sony had sold nearly 20 million albums, generating in excess of $175 million in revenue for Sony.[157] Charging that the group's "purported termination is based upon entirely trumped up and baseless claims," Sony also claimed that it had already re-negotiated the group's deal, that it had paid the group millions of dollars in royalties, and that it would suffer damages of at least $100 million if the group failed to produce the five disputed albums.[158]

The Dixie Chicks, however, brought a counterclaim against Sony in October 2001, seeking to terminate their contract with Sony alleging that Sony had cheated the group out of royalties exceeding $4 million.[159] In a state-

ment following the filing of their counterclaim, the Dixie Chicks asserted that they "refuse to sit back and silently endorse this behavior simply because this is a 'standard' practice at Sony. This is about people keeping their word."[160]

Yet less than one year after accusing Sony of cheating the group, the Dixie Chicks signed in July 2002 a reputedly lucrative settlement.[161] While the precise terms of the settlement will not be publicly released pursuant to a confidentiality agreement within the settlement, numerous press sources report that the group re-negotiated its contract with Sony, receiving as part of the deal, a $20 million advance and an increased royalty rate of twenty percent.[162] In exchange, the Dixie Chicks must reimburse Sony for roughly $15 million from record sales before collecting royalties and produce subsequent albums on their newly created label, Open Wide Records, which is managed entirely by Sony Music.[163]

Like the settlement between Courtney Love and Vivendi Universal, this settlement—while potentially lucrative for both parties—is a mixed blessing. The standard contract practices of the recording industry that both counterclaims sought to challenge still remain. Natalie Maines describes the settlement as a "hollow victory", despite the fact that Sony renegotiated the contract in the group's favor.[164] Bill Friskics-Warren, editor of the weekly *Nashville Scene*, wrote for the *New York Times* that "had the Dixie Chicks' suit gone to court and been settled in their favor, the decision might have had far-reaching implications, perhaps making it easier for artists to renegotiate long-term contracts."[165] Said Natalie Maines in response, "We would have been in the history books if we'd have taken it to the end. We definitely meant to do more for the industry. It just got to the point where we had done as much as we could without jeopardizing our careers."[166] In another interview, Maines stated, "I don't know how many doors or walls we knocked down."[167] How many doors and walls the Dixie Chicks *did* knock down will likely become clear throughout the ongoing debate surrounding provisions in recording contracts. Maines' statement that her group could possibly have accomplished more for the cause of recording artists further implies that a disparity *does* exist between the bargaining power of an artist of her stature and that of a lesser-known artist. That is, while her group may be able to afford an expensive agreement, lesser-known artists must rely on security devices provided to them by the state—in the form of the Seven Year Statute, for example.

ADDED in 1987, the exception exempts recording artists from the seven-year limitation, thus allowing for enforcement of recording contracts-but no other personal service contracts-in excess of seven years.

IV. A Chance to Tip the Balance

California Senate Bill 1246

California State Senator Kevin Murray (D-Culver City), a former musician and talent agency official, has been developing legislation "that could open the door on free agency for recording artists—setting the stage for a political showdown between the nation's biggest music stars and the corporations that employ them."[168] In a public statement, Senator Murray noted that he believes "there is sympathy in the Legislature for the artists' position on California Labor Code Section 2855. The fact that the amendment singles out recording artists and no one else raises eyebrows among lawmakers—the amendment is suspect."[169]

On January 7, 2002, Senator Murray introduced California Senate Bill No. 1246.[170] This Bill proposes an amended version of the Seven Year Statute, which eliminates the exception for recording artists in subdivision (b) of the Statute. Specifically, the amendment would leave subdivision (a) of the Statute in effect, delete the provisions relating to personal services in the production of sound recordings, and modify the subdivision addressing recovery of damages for breaches of recording contracts.[171] The amended version of the statute also adds an introductory section describing the policy underlying the proposed amendment.[172] Drawing on the original policy expressed in the holding in *De Haviland v. Warner Bros. Pictures*, this introduction reads as follows:

> Section 1. It is the fundamental policy of the State of California that no employee shall be contractually bound to an employer beyond seven years. The Legislature confirms the holding in *De Haviland v. Warner Bros. Pictures* (1944) 67 Cal.App.2d 225, that seven years is fixed as the maximum time for which employees 'may contract for their services without the right to change employers or occupations. Thereafter, they may change if they deem it necessary or advisable' in order to employ their abilities to 'the best advantage and for the highest obtainable compensation."
>
> In accordance with this holding, it is the policy of this state that this protection may not be waived by an employee and that employees as a group have

the right to change employers or occupations after seven years. The legislature finds that if it were possible for an employee to waive by agreement his rights under the law, the law would be meaningless. Therefore, the Legislature declares that a contract for personal services, whether for general services or 'exceptional' services as described in *De Haviland v. Warner Bros. Pictures, supra*, may only be enforced for a term not exceeding seven years from the commencement of services under it.

Furthermore, it is the policy of the state that these protections be afforded to each and every resident of the State of California and that this requirement may not be waived by contract.

Section 2. It is the intent of the Legislature to restore the rights, obligations, and remedies contained in Section 2855 of the Labor Code prior to its amendment by Chapter 591 of the Statutes of 1987.

The Legislature does not intend that the enactment of this act support any inference about the meaning of Section 2855 of the Labor Code prior to the date of this act's enactment or with respect to any industry other than the phonorecord industry. [173]

Following this introductory statement of policy the Bill, in section 3, restates subdivision (a) of section 2855, which establishes the general rule against enforcement of personal service contracts exceeding seven years in duration. [174] The Bill then deletes subdivision (b), which currently articulates the exception for recording artists, and replaces this subdivision with the following:

(b) Notwithstanding subdivision (a), in an action for breach of contract brought after the expiration of the seven-year period provided for in subdivision (a) against a recording artist who has availed himself or herself of the protections of this section and who is a party to a contract to render personal service in the production of phonorecords in which sounds are first fixed, as defined in Section 101 of Title 17 of the United States Code, damages, if any, are limited as follows:

(1) If the recording artist has delivered three albums or fewer under the contract and the contract required the recording artist to produce at least two more albums, the recording company may recover damages for the nondelivery of two albums.

(2) If the recording artist has delivered four, five, or six albums under the contract and the contract required the recording artist to produce at least two more albums, the recording company may recover damages for nondelivery of one album.

(3) No damages may be recovered if at least seven albums have been produced under the contract.

(4) The recording company may not recover damages pursuant to this subdivision if the recording artist elects to produce, as applicable, the requisite number of albums specified in paragraph (1) or (2).

(c) An action brought against an artist that is commenced prior to the expiration of the seven-year period in subdivision (a) of Section 2855 shall, upon the expiration of the seven-year period, be subject to the limits on damages in this section.

(d) Costs and advances for the albums produced pursuant to paragraph (4) of subdivision (b) shall be borne by the parties as outlined in the contract between the parties. A record company may apply an advance already paid to a recording artist for a specific album that was not delivered, to an album or albums produced and delivered pursuant to paragraph (4) of subdivision (b). A record company may also recover an advance, which has not yet been recouped and that has already been paid to a recording artist for a specific album required in the contract between the parties that has not been delivered and for which damages are not provided pursuant to subdivision (b).

Section 4. Section 2 of this act does not apply to a civil action commenced prior to the effective date of this act.

Analysis of Senate Bill 1246

As originally introduced in January 2002, SB 1246 contained neither the above statement of policy nor the subdivisions replacing the original subdivision (b). [175] Instead, SB 1246 simply deleted subdivision (b), containing the exception for recording artists added in 1987, and kept intact the text of subdivision (a). [176] Only as the process of negotiating with lobbyists from both sides continued were the subsequent two parts added. [177] The new subdivision (b) limits the amount of damages for which a recording company may sue a recording artist *after* the expiration of a seven-year contract period between the two parties. [178] While it seems likely that the ideal result for recording artists would be the mere elimination of the recording artist exception, it seems equally likely that the recording companies would so irrepressibly lobby against passage of SB 1246 as to defeat the Bill entirely.

Instead of answering only the demands of recording artists, SB 1246 in its present form, attempts to reach a compromise acceptable to *both* recording artists and recording companies. The introductory statement of policy and the provisions limiting damages for breach of contract by recording artists in subdivisions (b), (c), and (d) [179]

together represent both an overdue return to the original intent of the California Legislature, as reflected in *De Haviland v. Warner Bros. Pictures*,[180] to limit all personal service contracts to seven years, as well as legislative acknowledgment that business practices of the contemporary recording industry require some degree of assurance that recording artists cannot simply walk away from their contracts without compensating the companies at all.

The statement of policy in section 1 of SB 1246 makes clear that recording companies may not attempt to contract around the proposed amended Seven Year Statute.[181] As the Seven Year Statute currently stands, this is not an issue because the statute poses no time limitation on recording contracts.[182] It is this issue however, that was the core of *DeHaviland*.[183] As mentioned earlier, the Court in DeHaviland noted "it scarcely could have been the intention of the Legislature to protect employees from the consequences of their improvident contracts and still leave them free to throw away the benefits conferred on them."[184] While the holding of *DeHaviland* -- that the Seven Year Statute's limitation on personal service contracts may not be waived -- is still good law, SB 1246 attempts to foreclose potential litigation over this very issue by clearly restating the *DeHaviland* holding.[185] Even though the restatement of the *DeHaviland* holding does *not* specifically mention recording artists, the fact that recording contracts are the implied target of the restatement -- as evidenced by the addition of section (b) -- does serve to lessen the adhesive nature of recording contracts by ensuring the timely termination of the contract, no matter what sort of terms the recording company includes. Enactment into statutory law of this holding, then, would be a victory -- if only a small one -- for recording artists.

The provisions in section 3, subdivision (b), limiting damages however, constitute a compromise for both sides.[186] For the recording artist, these provisions dramatically reduce the likelihood that lawsuits for damages of hundreds of millions of dollars will be brought by record companies for breach of contract. On the other hand, the benefits of these provisions only apply after the expiration of the statutory seven-year period.[187] The benefit of this compromise to recording companies is obvious: recording artists are still -- though to a lesser extent than post-1987 -- excluded from the default rule of the Seven Year Statute. In other words, recording companies can still use the threat of damages to compel artists to remain bound to their contracts even after expiration of seven years.

After the statutory seven years have run however, Senator Murray's revised SB 1246 provides that the damages for which the artist *can* be sued are limited based on the number of albums the artist has already produced.[188] It seems likely that the practical effect of the current amendment would be to benefit only those artists who have already contracted with a recording company for at least seven years who would tend to be established, rather than lesser-known artists. While this effect seems not to benefit all artists, it is still the identical effect of the original-i.e., pre-1987-Seven Year Statute; that is, until the statutory seven years have run, a recording can company can sue *any* breaching recording artist for damages or for specific performance.

But regardless of their prominence, recording artists benefit from Senator Murray's damage limitations. If a lesser-known artist has produced fewer than three albums under a contract, after seven years the recording company can recover damages for no more than two albums. Assuming the artist is not well known, the company will not be able to claim a high amount of damages, and it may ultimately be cheaper for the company to drop the artist than to dispute the amount of damages in court. On the other hand, if the artist is prominent, the company is still limited to damages for no more than the value of two albums. While the damages in this scenario will be greater than for a lesser-known artist, a more prominent artist will possess greater bargaining power and is likely to be able to negotiate a favorable settlement.

Following the breakdown of negotiations in August 2002 between recording artists and recording companies, the media reported that another major impasse for both groups was the issue whether SB 1246, if enacted, would apply retroactively.[189] Speaking on behalf of recording companies, RIAA chief executive officer Hilary Rosen expressed strong discontent with the idea of retroactivity: "[There are] contracts that have been negotiated, advances that have been paid by the terms of the current law, and to say the contracts are retroactive would give current artists the benefits of all the new limits on damages, but the record companies would get no advantages."[190] In other words, Rosen's fear is that retroactive application of the statute

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would open the door to lawsuits, motivated by the proposed damage caps in SB 1246, by artists against recording companies that the artists previously would not have undertaken. Rosen seems to imply however, that the recording industry would agree to the compromise proposed in SB 1246 if the statute as enacted will not apply retroactively.[191] Non-retroactivity would mean, of course, that none of the signed artists advocating SB 1246 -- and who have a personal interest in the Bill's passage in order to enable a lawsuit against his or her recording company -- would benefit from the amendment. On the other hand, SB 1246 would still benefit artists who sign recording contracts following the Bill's enactment. The status of retroactivity as a valuable bargaining chip for both sides could further work to artists' detriment; if the recording companies persuade the California Legislature to make the amendment non-retroactive, the hundreds of artists lobbying for SB 1246 will lose great incentive to continue lobbying. That is, they will be lobbying for a statute that will have no effect on their own contracts, but will only affect future and as yet unsigned recording artists. As a result, the recording companies now have enormous incentive to lobby for non-retroactivity, for the success of such lobbying would take the proverbial wind out of the artists' sails. The remaining question, then, is whether the signed recording artists currently lobbying for the passage of SB 1246 have sufficient foresight to push the Bill through the California Congress notwithstanding the Bill's retroactive effect. That is, the only way to ensure any victory at all for artists -- current or future -- in this battle is for the lobbying artists' coalitions to *unconditionally* support SB 1246. This is not, of course, to suggest that the artists' coalitions should concede non-retroactivity; rather, the artists must unselfishly take care to realize if and when such concession is the sole path to enactment of SB 1246.

Further Reactions by Record Companies and Recording Artists

The recording companies' pugilistic opposition to all aspects of SB 1246 does not, of course, come as a surprise.[192] Record company executives contend that removing the exception for recording artists in the Seven Year Statute would badly damage the industry. Immediately upon learning of Senator Murray's proposed amendment, the chief executive officers of the "big five" recording companies[193] sent to Senator Murray a letter articulating their objections to the bill. Contending that removal of the exception for recording artists would alter the "very fundamentals" of the music business, the executives wrote that the exception to the Seven Year Statute was added "in recognition of the unique nature of recording contracts and simply clarifies that an artist has a legal obligation to produce the number of albums to which he or she freely commits and that damages can be sought if he or she fails to do so."[194] The ultimate effect of this, according to the executives, is that recording companies would enter into fewer contracts with artists for fear of having no recourse if the artist breaches.[195] Painting a bleak picture of the film industry, Miles Copeland predicts that a similar situation may arise in the recording industry if the exception is removed: "The film industry no longer takes an unknown actor and builds them [*sic*] ... into superstars. They just buy them at whatever level they happen to be. You hire a Schwarzenegger, you pay him his fee, you do the movie, he happens to be big at that time and you have to evaluate whether he's worth that money or not at any given time."[196]

Supporters of the amendment argue however, that the seven-year limit on personal service contracts has *not* hurt the film and television industries. Jay Cooper, head of the entertainment law practice at the law firm Greenberg Traurig and an adviser to RAC, observes that such television shows as *Friends*, *Seinfeld* and *Cheers* remained on the air for longer than seven years.[197] According to Cooper, the networks producing these shows "knew that the contract[s were] up at seven years and the artists could walk at seven years, and yet, they renegotiated with all those artists and those networks are thriving."[198] A further implication of the proposed amendment may be that musicians will become free agents, like, for example, athletes and movie stars.[199] This would mean that the artists could be able to use their *talent* as a primary bargaining tool. Michael Nathanson, a music analyst, puts it aptly: "It's going to be like the mantra in the movie business: talent, talent, talent."[200]

For many artists however, the bottom line is that the debate surrounding the proposed amendment is about fairness.[201] According to Ken Hertz, a Los Angeles attorney who represents artists such as Will Smith and Alanis Morissette, the ultimate question is whether artists deserve the same treatment under employment laws that govern all other types of employees.[202] In its Statement in Support of SB 1246, AFTRA, on behalf of its 80,000 members, noted that Senator Murray's bill "would restore fairness to a group of individuals who were singled out in 1987 for exclusion from the protections granted by §2855 to all other individuals in the State of California."[203] Yet despite his advocacy for recording artists, Hertz is cautious to keep the debate in perspective:

> The funny part of all of this is that the seven-year statute really only becomes relevant in the highly unlikely event that an artist is so successful after seven years of adhering to a recording contract—and thus becomes one of only a handful of artists that generates all of a label's profits—that the artist might have a bit more leverage in negotiating a new deal with the record company. The amendment that recording artists seek to repeal makes even that remote possibility a pipe dream.[204]

Conclusion

Perhaps the most evident observation suggested by the oscillating balance between recording companies and recording artists is the vehemence with which both sides now lobby their causes in the state and federal legislatures. Between *De Haviland v. Warner Bros. Pictures* in 1944 and the creation of the recording artist exception in the Seven Year Statute in 1987, little lobbying was heard from either the recording companies or the recording artists. Even after 1987, recording artists were comparably quiet. It was not until Congress' 1999 amendment of the Copyright Act that both recording artists and recording companies, respectively, loudly voiced their concerns.[205] To protest the 1999 Copyright Act amendment, recording artists Don Henley and Sheryl Crow, among others, co-founded the RAC.[206] While formed to serve as a "voice for artists' rights,"[207] the primary impetus behind its founding was to lobby Congress to delete sound recordings from the definition of "works made for hire" in the Copyright Act. [208] Together with intense lobbying by AFTRA, individual recording artists and legal scholars, the RAC succeeded-in October 2000, sound recordings were removed from the definition of "works made for hire."[209]

The momentum gained by artists in this lobbying effort inspired an attack on the other proverbial thorn in the side of recording artists-the Seven Year Statute. Since mid-2001, politicians, most notably Senator Kevin Murray, themselves have responded to this momentum by meeting with dozens of recording artists, artists' coalitions and labor union officials.[210] Perhaps the most ambitious lobbying move yet staged by recording artists was four simultaneous concerts occurring in Los Angeles on February 26, 2002. Led by Henley, RAC organized the concerts, which included performances by artists such as The Eagles, Sheryl Crow, the Dixie Chicks, Billy Joel, Tom Petty and Beck.[211] All concert proceeds went to RAC for the legal bills it has incurred in its lobbying efforts.[212] In all, the concerts raised $2.5 million for RAC.[213] Henley however, is careful to note that the concerts were not only about raising money: "This is an awareness-raising exercise, but the money that we're going to generate is not insignificant."[214]

On a macroscopic scale, the current goal of recording artists is to push the California Congress to return to the pre-1987 status quo. As such, it seems that recording artists are actually gaining little more than ground lost over the past sixteen years. Yet while both sides zealously dispute the prudence of a return to the pre-1987 status quo, such a return may indeed represent the original intent of the U.S. Legislature and the California Legislature. That is, it is clear that when both the Copyright Act and the Seven Year Statute were passed, neither singled out recording artists or sound recordings in any sort of exception. Thus, (re)achieving the original aim of these laws involves two hurdles. First, the elimination of sound recordings from the definition of "works made for hire" in the Copyright Act. Recording artists cleared this hurdle only in 2000, but it was only their first victory. The second hurdle is the elimination of the recording artist exception in the Seven Year Statute. This remains the largest obstacle facing recording artists today. Whether these lobbying efforts result in victory for recording artists will be determined in Fall 2003 when the California Senate is slated to vote on SB 1246.

The significance of this vote's outcome looms large: if passed, the amended Seven Year Statute indubitably will affect the way that all recording artists negotiate and perceive their contracts with recording companies. Most fundamentally, a non-"superstar" artist with little bargaining power can be assured that no matter how adhesive the contract he or she signs, after seven years the artist's breach will permit the recording company only limited damages -- even if the company provides otherwise in the contract.[215] If, on the other hand, the vote is in favor of the recording companies, the likely outcome is increased litigation between disgruntled recording artists and uncompromising recording companies. Not to be overlooked as well is that in either case, there will be increased bitterness between the two sides of the industry as a result of the heightened, fervent lobbying that has characterized the campaign to amend the Seven Year Statute. All things considered, the California Legislature should seize the opportunity to emulate the corrective action taken by the United States Congress in 2000 and amend the Seven Year Statute to the benefit of recording artists.

ENDNOTES

[1] Don Henley, onetime leader of the rock band The Eagles. Stated at the Select Committee Hearing on the Entertainment Industry, convened at the California State Capitol in Sacramento by California State Senator Kevin Murray (D-Culver City) (Sept. 5, 2001), *available at* http://archive.salon.com/ent/music/feature/2001/09/06/love_in_sacto.

[2] J.D. Candidate, Vanderbilt University Law School, 2003; B.A., Oberlin College, 1999; B.Mus., Oberlin Conservatory of Music, 1999.

[3] Lynn Morrow, *The Recording Artist Agreement: Does it Empower or Enslave?*, 3 VAND. J. ENT. L. & PRAC. 40, 41 (2001). Lynn Morrow practices with King & Ballow in Nashville, Tennessee. She is a member of the Nashville and Tennessee Bar Associations, as well as the Entertainment and Sports Section for the State Bar of California. *Id.* at 40. Additionally, she serves as a member of the Gospel Music Association, the Country Music Association, and the Copyright Society of the South. *Id.*

[4] *Id.* at 41.

[5] *See, e.g.,* BERNARD SHERMAN, INSIDE EARLY MUSIC (Oxford University Press 1997). The Early Music Movement, begun in earnest in the 1950s, has its roots in Amsterdam, Brussels, London, and Vienna. The patriarchs of this movement -- Gustav Leonhardt and Nikolaus Harnoncourt -- are still outspoken advocates of performing works composed prior to the development of modern instruments -- i.e., prior to the nineteenth century -- on either original instruments of the appropriate period or on replicas. For example, a work composed for a Flemish double manual harpsichord is performed not on a modern piano but on a Flemish double manual harpsichord. This movement gained great speed throughout the 1960s and 1970s, growing from an approach limited to the Low Countries and the United Kingdom to a multifarious approach practiced today throughout all of Europe, the Americas, and the Far East.

[6] Ton Koopman directs the Amsterdam Baroque Orchestra and Choir. In addition, he is professor of harpsichord at the Royal Conservatory in The Hague and is Honorary Member of the Royal Academy of Music in London. (Koopman records exclusively for Time-Warner/Erato). *See* http://www.tonkoopman.nl/biotoneng.htm (last viewed Mar. 12, 2003).

[7] Nicholas Baumgartner, *European Bach Interpretation at the Close of the Millennium*, BACH, J. OF THE RIEMENSCHNEIDER BACH INST., Vol. 33 No. 1 (2002) at 41-42.

[8] *See generally supra* note 6.

[9] Morrow, *supra* note 3, at 43.

[10] *Id.*

[11] *See* 17 U.S.C. § 101 *et seq.* (2002).

[12] CAL. LAB. CODE § 2855 (Deering 2003).

[13] *See generally* Morrow, *supra* note 3; *see also* Ryan Ashley Rafoth, Note, *Limitations of the 1999 Work-for-Hire Amendment: Courts Should Not Consider Sound Recordings to be Works-for-Hire When Artists' Termination Rights Begin Vesting in Year 2013*, 53 VAND.L.REV. 1021, 1022-23 (2000); American Federation of Television and Radio Artists, *Position on "Work Made for Hire" and Section 101 of the Copyright Act, available at* http://www.recordingartistscoalition.com/aftra.html [hereinafter AFTRA, *Position on Section 101*]; Ann Chaitovitz, *Statement Before the Select Committee on the Entertainment Industry*, Sept. 5, 2001, *available at* http://www.aftra.org/resources/pr/0901/chaitovitz.html [hereinafter *Chaitovitz Statement*]; and *Letter to Representatives Howard Coble and Howard Berman*, May 22, 2000, *available at* http://www.recordingartistscoalition.com/letter.html [hereinafter *RAC Letter*].

[14] *See* 17 U.S.C. § 101 *et seq.* (2002); *see also* GEOFFREY P. HULL, THE RECORDING INDUSTRY 203-19 (1998).

[15] 17 U.S.C. § 101 (2002) ("A 'work made for hire' is (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."). Although the statute does not expressly use the term "independent contractor," the United States Supreme Court has construed the phrase "a work specially ordered or commissioned for use as a contribution" -- in contrast to the immediately preceding phrase "a work prepared by an employee within the scope of his or her employment" -- to imply work performed by an independent contractor. Community for Creative Non-Violence v. Reid, 490 U.S. 730, 742-43 (1989).

[16] *See* Appendix G to Public Law 106-113, S. 1948, 1011, Nov. 29, 1999 ("(d) Work Made for Hire: Section 101 of Title 17, United Statees Code, is amended in the definition relating to work for hire in paragraph (2) by inserting 'as a sound recording' after 'audiovisual work'").

[17] RAC, co-founded in 1999 by, among others, Don Henley and Sheryl Crowe, is a nonprofit, non-partisan coalition formed to represent the interests of recording artists with regard to legislative issues in which corporate and artists' interests conflict, and to address other public policy debates that come before the music industry. RAC was founded initially to protest the 1999 Amendment to the Copyright Act. Roughly 150 members form RAC, including such artists as Eric Clapton, Billy Joel, Madonna, Dave Matthews, No Doubt, R.E.M., Bruce Springsteen, and Sting. *See* http://www.recordingartistscoalition.com (last viewed Mar. 12, 2003).

[18] AFTRA is a national labor union representing over 80,000 artists and professionals such as singers, actors, announcers, dancers, and comedians, as well as broadcast journalists and technicians. AFTRA maintains several hundred collective bargaining agreements with companies engaged in the television, radio, advertising, digital programming, and sound recording industries. Among these agreements is the National Code of Fair Practice for Sound Recordings, to which over 1,200 record labels, including the five

major labels -- Vivendi Universal (France), Sony Corporation (Japan), Bertelsmann (Germany), EMI Group (United Kingdom), and AOL Time Warner Inc. (United States) -- are signatory. See http://www.aftra.com (last viewed Mar. 12, 2003).

[19] See, e.g., AFTRA, *Position on Section 101*, *supra* note 13; RAC, *Issues: Work For Hire*, *available at* http://www.recordingartistscoalition.com/workforhire.html [hereinafter *RAC Issues*]; Don Henley, *Statement on Behalf of Recording Artists' Coalition Before the Committee of the Judiciary*, Apr. 3, 2001, *available at* http://www.recordingartistscoalition.com/henley_statement.html [hereinafter *Henley Statement*].

[20] See, e.g., Hull, *supra* note 14, at 212; Rafoth, *supra* note 13, at 1022-23 (2000).

[21] *RAC Letter*, *supra* note 13.

[22] 106 P.L. 379, 114 Stat. 1444, Enacted H.R. 5107, 106 Enacted H.R. 5107, Oct. 27, 2000 ("Sec. 2. Work Made For Hire. (a) Definition. The definition of 'work made for hire' contained in section 101 of title 17, United States Code, is amended (1) in paragraph (2), by striking 'as a sound recording'...").

[23] CAL. LAB. CODE § 2855 (Deering 2003).

[24] *Chaitovitz Statement*, *supra* note 13.

[25] CAL. LAB. CODE § 2855 (Deering 2003).

[26] *Chaitovitz Statement*, *supra* note 13.

[27] CAL. LAB. CODE § 2855(b) (Deering 2003); *Id.*

[28] See, e.g., testimony by country music singer LeAnne Rimes. Rimes asserts that she will not have fulfilled her contract obligations until she is 35. Rimes entered into her recording contract when she was 12. *See Select Commisstee on the Entertainment Industry – Sept. 5 Hearing*, *available at* http://democrats.sen.ca.gov/senator/murray (last viewed Mar. 12, 2003).

[29] Senate Bill 1246, 2002 Sen., Reg. Sess. (Ca. 2002), *available at* http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1201-1250/sb_1246_bill_20021209_status.html (last viewed Mar. 12, 2003). All references hereinafter to S.B. 1246, first introduced in the 2001-02 session of the California State Legislature, may be found at this website.

[30] On Aug. 15, 2002, Senator Murray withdrew this bill, which he plans to include in 2003 as part of a comprehensive legislative package on artists' rights. See Justin Oppelaar, *Diskeries Resist Retro Rule*, DAILY VARIETY, Aug. 8, 2002; Russ Wiederspahn, *Recording Industry's Seven-Year Itch Still Needs Scratching*, CITY NEWS SERVICE, Aug. 15, 2002; Melinda Newman, *RAC, RIAA '7-Year' Talks Fail*, BILLBOARD, Aug. 17, 2002; *all available at* LEXIS, News Group File.

[31] See S.B. 1246 subdivision (b), *supra* note 29.

[32] Morrow, *supra* note 3, at 42-43.

[33] 17 U.S.C. § 101 (2002).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Hull, *supra* note 14, at 212.

[38] See *id.*

[39] MICHAEL L. REINERT & MARK A. GOLDSTEIN, *Sample Recording Agreement*, *in* COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 9, 51-52 (Martin E. Silfen, ed., 2001).

[40] *Cf.* language in Seven Year Statute: "Any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which can not be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the persons contracting to render the service, for a term not to exceed seven years from the commencement of service under it. CAL. LAB. CODE § 2855(a) (Deering 2003).

[41] Reinert, *supra* note 39, at 75-76.

[42] *Id.* at 76.

[43] *See generally* Rafoth, *supra* note 13.

[44] RIAA is the trade group that represents the American recording industry. Its mission is to foster a business and legal climate that supports and promotes its members'-i.e., recording companies-creative and financial vitality. RIAA members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States. See http://www.riaa.com.

[45] See, e.g., Henley Statement, *supra* note 19; RAC Issues, *supra* note 19; AFTRA, *Position on Section 101*, *supra* note 13; *RAC Letter*, *supra* note 13.

[46] Satellite Home Viewer Improvement Act, S. 1948, tit. I, sec. 1101(d) (1999), *incorporated in and passed as,* Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501 (1999).

[47] AFTRA, *Position on Section 101, supra* note 13; *See id.*

[48] Satellite Home Viewer Imiprovement Act, *supra* note 46.

[49] AFTRA, *Position on Section 101, supra* note 13. *See also* Satellite Home Viewer Improvement Act, *supra* note 46.

[50] 17 U.S.C. § 203 (2003). *See also* Hull, *supra* note 14, at 212; Rafoth, *supra* note 13, at 1022-23.

[51] 17 U.S.C. §§ 203, 304 (2003). *See also* Hull, *supra* note 14, at 212-15.

[52] *See generally* Morrow, *supra* note 3; Hull, *supra* note 14.

[53] Morrow, *supra* note 3, at 42.

[54] *Id.* at 42-44.

[55] *Id.*

[56] *Id.* at 45.

[57] *Id.* at 42-45.

[58] *Id.*

[59] See Reinert, *supra* note 39.

[60] See AFTRA, *Position on Section 101, supra* note 13; *See also RAC Letter, supra* note 13.

[61] *RAC Letter, supra* note 13.

[62] *Id.*

[63] *Id.* 17 U.S.C. § 203 governs the contract, then the artist may recapture his or her assigned rights thirty-five years after the date of the assignment. 17 U.S.C. § 203 (2002).

[64] 17 U.S.C. § 203.

[65] *Id.*; Hull, *supra* note 14, at 214.

[66] Hull, *supra* note 14, at 214.

[67] *Id.*

[68] 17 U.S.C. § 203.

[69] 17 U.S.C. § 101.

[70] *Id.* Such works comprise the nine statutory definitions of works made for hire in the Copyright Act.

[71] 490 U.S. 730 (1989).

[72] *See RAC Letter, supra* note 13 (advocating application of Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)).

[73] *Reid,* 490 U.S. at 751-52. The *Reid* Court listed thirteen factors for determining whether a hired party is an employee under the general common law of agency: (1) the hiring party's right to control the manner and means by which the product is accomplished; (2) the skill required of the hired party; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party. *Id. See also* Restatement of the Law of Agency § 220(2) (setting forth a nonexhaustive list of factors relevant to determining whether a hired party is an employee).

[74] 17 U.S.C. § 101 ("A 'work made for hire' is ... (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."). *See also RAC Letter, supra* note 13.

[75] *RAC Letter, supra* note 13. *See also* Ballas v. Tedesco, 41 F.Supp. 2d 531, 541 (D.N.J. 1999); Staggers v. Real Authentic Sound, 77 F. Supp. 2d 57, 64 (D.D.C. 1999).

[76] See Satellite Home Viewer Improvement Act, *supra* note 46.

[77] Rafoth, *supra* note 13, at 1022-23.

[78] *See id.*

[79] See 17 U.S.C. § 203(b) (1994).

[80] See *generally* Mills Music v. Snyder, 469 U.S. 153, 172-73 (1985).

[81] This general policy, as stated above, is the promotion and insurance of "the attribution of authorship to the individual or individuals actually responsible for the creation of works." *RAC Letter, supra* note 13.

[82] *Ballas,* 41 F. Supp. 2d at 541.

[83] *Id.*

[84] *RAC Letter, supra* note 13.

[85] See Chuck Philips & Dan Morain, *Measure on Music Contracts Planned; Entertainment: State Senator Says He'll Challenge Statute that Ties Recording Artists to Years-long Contracts,* L.A. TIMES, Oct. 19, 2001, at Part 3, Page 1, *available at* LEXIS News Group File.

[86] See *Select Committee on the Entertainment Industry—Sept. 5 Hearing, available at* http://democrats.sen.ca.gov/senator/murray (last viewed Mar. 12, 2003).

[87] *Id.*

[88] CAL. LAB. CODE § 2855 (Deering 2003).

[89] *Id.* at § 2855(a).

[90] *Id.* at § 2855(b). The full text of this exception appears *infra* at p. 4.

[91] 67 Cal.App. 2d 225 (1944).

[92] *Id.* at 230-31.

[93] *Id.* at 228.

[94] *Id.*

[95] *Id.* at 228-29.

[96] *Id.* at 228.

[97] *Id.* at 236-37.

[98] *Id.*

[99] See *Select Committee on the Entertainment Industry-Sept. 5 Hearing, supra* note 86.

[100] *Id.* (quoting the RIAA).

[101] CAL. LAB. CODE § 2855(b) (Deering 2003).

[102] *Id.*

[103] *Select Committee on the Entertainment Industry-Sept. 5 Hearing , supra* note 86.

[104] *Id.*

[105] Morrow, *supra* note 3, at 43.

[106] *Select Committee on the Entertainment Industry-Sept. 5 Hearing , supra* note 86.; Morrow, *supra* note 4, at 43-44.

[107] *Select Committee on the Entertainment Industry-Sept. 5 Hearing , supra* note 86.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] Laura M. Holson, *Music Stars Complain About Stringent Contracts,* N.Y. TIMES, Sept. 6, 2001, at C1.

[113] AFTRA, *Statement in Support of S.B. 1246,* Jan. 21, 2002, *available at* http://www.aftra.com/resources/pr/0102/statement.html (last viewed Mar. 12, 2003).

[114] *Id.*

[115] *Id.*

[116] *Select Committee on the Entertainment Industry-Sept. 5 Hearing , supra* note 86.

[117] Love states that "last Nov. [1999], a Congressional aide named Mitch Glazier, with the support of the RIAA, added a "technical amendment" to a bill that defined recorded music as 'works for hire' under the 1978 Copyright Act." See *infra* note 118.

[118] Courtney Love, *Courtney Love Does the Math,* Speech at the Digital Hollywood Online Entertainment Conference, May 16 2000, *available at* http://archive.salon.com/tech/feature/2000/06/14/love.

[119] Statement by Miles Copeland, founder of I.R.S. Records, Select Committee Hearing on the Entertainment Industry, *supra* note 1.

[120] *Id.*

[121] AFTRA, *Statement In Support of S.B. 1246*, *supra* note 113.

[122] *Id.*

[123] See CAL. LAB. CODE. § 2855(a) (Deering 2003) ("Any contract, otherwise valid, to perform or render service of a special, unique...character, which gives it peculiar value and *the loss of which can not be reasonably or adequately compensated in damages in an action at law,* may nevertheless be enforced against the person contracting to render the service ..." (emphasis added)).

[124] See, e.g., discussions of Courtney Love v. Vivendi Universal and Dixie Chicks v. Sony Music Entertainment, *infra* section III.

[125] *Id.*

[126] See CAL. LAB. CODE § 2855(a) (Deering 2003). *See also* S.B. 1246 subdivision (b) (favoring artists by limiting damages that may be claimed by a recording company based on the number of albums produced).

[127] AFTRA, *Statement In Support of S.B. 1246*, *supra* note 113.

[128] *Id.*

[129] 106 P.L. 379 ("Sec. 2. Work Made For Hire. (a) Definition. The definition of 'work made for hire' contained in section 101 of title 17, United States Code, is amended (1) in paragraph (2), by striking 'as a sound recording'..."), supra note 22.

[130] *RAC Letter*, *supra* note 13.

[131] RAC: *Issues*, *supra* note 19.

[132] *RAC Letter*, *supra* note 13.

[133] *Id.*

[134] *Id.*

[135] Both cases, Courtney Love v. Vivendi Universal and Dixie Chicks v. Sony Music Entertainment, were originally in district court and have since been settled (reporter citation unavailable).

[136] Chuck Philips, *Company Town Judge OKs Trial in Courtney Love Vivendi Claims; Courts: In a ruling reversal, the rock star can proceed with her lawsuit against the company*, L.A. TIMES, Oct. 3, 2001, *available at* LEXIS, News Group File, 2001 WL 2522751.

[137] *Id.* (quoting *Vivendi Universal*).

[138] *Id.* (quoting the author).

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.* (quoting A. Barry Cappello).

[143] Love, *supra* note 118.

[144] Bill Holland, *Appeals Court Clears Love's Labor-Code Challenge As Fight Intensifies*, BILLBOARD, Feb. 9, 2002, *available at* LEXIS, News Group File, 2002 WL 10065563.

[145] *Id.*

[146] Jeff Leeds, *How Courtney Love Lost Her Leverage, Settled Suit*, L.A. TIMES, Oct. 4, 2002, *available at* LEXIS, News Group File, 2002 WL 2508065.

[147] *Id.*

[148] *Id.*

[149] Jeff Leeds, *Courtney Love Settles Suit Against Vivendi Universal Music: The singer is released from contracts, increasing doubts about artists' rights drive*, L.A. TIMES, Oct. 1, 2002, 2002 WL 2507399.

[150] *Id.*

[151] *Id.*

[152] See discussion of Dixie Chicks lawsuit immediately *infra*.

[153] See discussion of California Senate Bill 1246 *infra* at Section IV.

[154] *Dixie Chicks Ask Court to Make Sony Sing the Blues*, ENTERTAINMENT LITIGATION REPORTER, Oct. 31, 2001, *available at* LEXIS, News Group File.

[155] *Id.*

[156] *Id.*

[157] Chuck Philips, *Dixie Chicks, Sony End Feud With a New Deal*, L.A. TIMES, C1, June 17, 2002, *available at* LEXIS, News Group File, 2002 WL 2483800.

[158] *Sony Music Sues the Dixie Chicks*, AP ONLINE, July 18, 2001, 2001 WL 24713358; *Philips*, *supra* note 157.

[159] *Id.*

[160] *Id.* (quoting the Dixie Chicks).

[161] Tamara Conniff, *Dixie Chicks, Sony Music Make Up, Sign a New Deal*, HOLLYWOOD REPORTER, June 18, 2002, *available at* LEXIS, News Group File, 2002 WL 19115162.

[162] *Id.*; *See also* Philips, *supra* note 157; Justin Oppelaar, *Chicks, Sony hatch deal, end lawsuits*, DAILY VARIETY, June 18, 2002; Phyllis Stark, *Launch of Open Wide Records Is Key Term in Group's Deal With Sony After 10-Month Battle*, BILLBOARD, June 29, 2002; *all available at* LEXIS, News Group File. According to Brian Mansfield, "The Chicks say both figures are wrong, but won't tell by how much." Natalie Maines "coyly" contends that "one's high and one's low." Brian Mansfield, *Dixie Chicks in Charge*, USA TODAY, Aug. 27, 2002, *available at* LEXIS News Group File, 2002 WL 4732338.

[163] Conniff, *supra* note 161.

[164] Mansfield, *supra* note 162.

[165] Bill Friskics-Warren, *The Dixie Chicks Keep The Heat On Nashville*, N.Y. TIMES, Aug. 5, 2002, at sec. 2, p. 1, col. 2, *available at* LEXIS, News Group File.

[166] *Id.*

[167] Mansfield, *supra* note 162.

[168] Philips, *supra* note 85.

[169] *Id.* (quoting Senator Kevin Murray).

[170] Legislative Counsel's Digest, S.B. 1246, *available at* http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1201-1250/sb_1246_bill_20021209_status.html (last viewed Mar. 12, 2003). S.B. 1246 is coauthored by Senators Alarcon, Chesbro, Haynes, Karnette, Romero, and Vincent; and Assembly Members Alquist, Cedillo, Horton, Keeley, Nation, Reyes, Strom-Martin, Washington, and Wright.

[171] *Id.*

[172] *Id.*

[173] S.B. 1246 (as amended Aug. 1, 2002) (citing De Haviland v. Warner Bros. Pictures, 67 Cal. App. 2d 225, (1944)), *available at* http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1201-1250/sb_1246_bill_20021209_status.html (last viewed Mar. 12, 2003).

[174] S.B. 1246 (as amended Aug. 1, 2002). The restatement is verbatim except for the deletion of the first clause "Except as otherwise provided in subdivision (b)." The restatement begins, then, as follows: "Section 3. (a) A contract to render personal service, other than a contract of apprenticeship as provided in Chapter 4..." *See supra* section II.

[175] *See* S.B. 1246, *available at* http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1201-1250/sb_1246_bill_20021209_status.html (last viewed Mar. 12, 2002).

[176] *Id.*

[177] S.B. 1246 (as amended Aug. 1, 2002).

[178] *Id.* at § 3(b).

[179] *Id.*

[180] 183 P.2d 983, 985-6 (1944).

[181] S.B. 1246 § 1 (as amended Aug. 1, 2002).

[182] CAL. LAB. CODE § 2855(b) (Deering 2003).

[183] *DeHaviland*, 153 P.2d at 988.

[184] *Id.* at 989.

[185] S.B. 1246 § 1 (as amended Aug. 1, 2002).

[186] *Id.* at § 3(b).

[187] *Id.*

[188] *Id.*

[189] Melinda Newman, *RAC, RIAA '7-Year' Talks Fail*, BILLBOARD, Aug. 17, 2002, *available at* LEXIS News Group File; Oppelarr, *supra* note 30.

[190] Newman, *supra* note 189.

[191] *Id.*

[192] Brooks Boliek & Tamara Coniff, *Calif. Bill Targets '7-Year' Law*, HOLLYWOOD REPORTER, Jan. 8, 2002, *available at* LEXIS,

News Group File.

[193] Bob Jamieson, president and CEO of BMG North America; Alain Levy, chairman and CEO of EMI; Thomas Mottola, former chairman and CEO of Sony Music; Andrew Lack, current chairman and CEO of Sony Music; Roger Ames, president and CEO of Warner Music Group; and Doug Morris, chairman and CEO of Universal Music Group.

[194] Boliek, *supra* note 192.

[195] *Id.*

[196] *Recording Artist Coalition Stages Concerts to Raise Awareness of Unfair Labor Practices by Record Labels*, NATIONAL PUBLIC RADIO, Feb. 27, 2002, *available at* LEXIS, News Group File.

[197] *Id.*

[198] *Id.*

[199] Laura M. Holson, *Importance of Being Important, With Music*, N.Y. TIMES, Jan. 9, 2002, at C1, *available at* LEXIS, News Group File.

[200] *Id.*

[201] Bill Holland, *'s Labor-Code Challenge As Fight Intensifies*, BILLBOARD, Feb. 9, 2002, *available at* LEXIS, News Group File.

[202] *Id.*

[203] AFTRA, *supra* note 113.

[204] Holland, *supra* note 201.

[205] See *supra* note 19.

[206] See *supra* note 17.

[207] See http://www.recordingartistscoalition.com (last viewed Mar. 12, 2003).

[208] See *generally supra* note 206.

[209] See *supra* sections II and III.

[210] *E.g., Senate Select Committee on the Entertainment Industry Hearings on Recording Artist Exemption to Seven Year Statute*, Sept. 5, 2001, *attended by* Patti Austin, Ann Chaitovitz, LeAnn Rimes, Don Henley, Courtney Love. See http://archive.salon.com/ent/music/feature/2001/09/06/love_in_sacto.

[211] Ironically, Courtney Love did not perform at or even attend any of these concerts. Rather, she attended a reception at the Beverly Hills Hotel preceding the Grammy Awards Ceremony. At this reception, Love met, for the first time, with Vivendi Universal chief executive officer Horowitz, and discussed terms of a potential settlement. See Leeds, *supra* note 146.

[212] Roy Waddell, *Four Sold-Out RAC Benefits Make Money, History*, BILLBOARD, Mar. 9, 2002, *available at* LEXIS, News Group File. In this article, Henley remarks that RAC has "bills to pay dating all the way back to May 2000 from lobbying and lawyering that was going on with the work-for-hire issue. We've had people working for us on a pro-bono basis and a pay-later basis." *Id.*

[213] *Id.*

[214] *Id.*

[215] S.B. 1246 (as amended Aug. 1, 2002). See http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1201-1250/sb_1246_bill_20021209_status.html (last viewed Mar. 12, 2003).